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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 179

J. L. WALTON, J. S. PICKARD, A. E. TOWNSEND AND S. G. GURLEY,

Petitioners,

vs.

CITY OF ATLANTA, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

JOHN A. DARSEY,
JOHN M. SLATON,
Attorneys for Petitioners.

JOHN A. DARSEY,
Hurt Building,
Atlanta, Georgia.
JOHN M. SLATON,
22 Marietta Street Building,
Atlanta, Georgia.
JOHN W. NESBITT,
Hurt Building,
Atlanta, Georgia,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, J. L. Walton, J. S. Pickard, A. E. Townsend and S. G. Gurley, respectfully pray that the writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on April 21, 1950, which affirmed the judgment of the District Court of the United States for the Northern District of Georgia, Atlanta Division, dismissing the petition herein. The opinion of the Circuit Court of Appeals is reported in the advance sheets at 181 F. (2d) 693 and appears at pages 30 to 32 of the Record. The opinion

of the District Court is reported in 89 F. Supp. 309 and at pages 22 to 30 of the Record.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, Section 1254 (1), of the United States Code.

Summary Statement of the Matter Involved

Recently the City of Atlanta amended the ordinance relating to permits for trolley drivers with what has become known as the "Fingerprint Law." The ordinance, as amended, provides, *inter alia,* that no person may drive trackless trolleys, etc., used in the transportation of persons for hire upon the city streets without a permit; sets forth certain conditions precedent to the granting of such permits, the controversial ones of which are the submission to fingerprinting and the furnishing and publication of personal photographs; and vests in the Chief of Police the authority to deprive the drivers of the fruits of their lawful avocation through delegation to him of undefined and unlimited authority to exercise discretion in suspending and revoking the same. The ordinance, enacted in the name of public safety, applies only to the drivers of an infinitesimal portion of the commercial and public traffic on the city streets; and provides for a $100.00 fine for violation thereof, with each day's violation a separate offense, thus imposing an undue financial burden upon the individual driver in any court test of his constitutional rights.

Thereupon, petitioners, who are officers and members of the local transit union, the membership of which comprises some seventeen hundred odd trolley drivers, brought a petition in the District Court challenging the ordinance, as amended, as unconstitutional in that it represents a ruthless and flagrant invasion of their constitutional per-

sonal rights and freedoms for no reason germane to the purported objective and, therefore, an unreasonable and arbitrary exercise of police power.

The District Court dismissed the petition. The subject matter of this petition is the opinion of the Circuit Court affirming this decision and prefaced with the shocking and strange concept that "We Cannot Say That it Would Not Be within the Power of a State to Require All Inhabitants to Have Their Fingerprints Taken by the Police". (Emphasis supplied.)

Questions Presented

1. When the Circuit Court adopted as the fundamental premise of its decision the legal concept that "We cannot say that it would not be within the power of a state to require all inhabitants to have their fingerprints taken by the police", did the Court err in failing to recognize and apply the legal limitations upon the exercise of state police power and the well established legal yardsticks and standards commonly employed by the Judiciary in determining whether exercise thereof is reasonable or unreasonable?

2. When the ordinance is self-enforcing as to the invasion of constitutional personal rights and freedoms, and the reasonableness or unreasonableness of the exercise of police power in this respect is the fundamental issue, did the Circuit Court err in failing to recognize, apply or give efficacy to the well established standards normally employed by the Judiciary in resolving this issue, *viz:*

(a) Do the means employed in the exercise of police power impose unreasonable and undue restrictions and burdens upon rights secured to individuals by the Bill of Rights?

(b) Are the means adopted reasonably necessary and appropriate for the accomplishment of a legitimate object falling within the scope of the power?

(c) Is there an obvious and real connection between the means adopted and the avowed objective?

(d) Do the means adopted tend toward the accomplishment of the purported objective in a degree that is perceptible and clear?

(e) Do the means go beyond the necessity of the case?

(f) Do the means adopted vest power of arbitrary discretion with reference to constitutional personal rights and freedoms in an administrative officer without prescribing uniform and definite standards for the exercise thereof? and

(g) Do the means employed embrace an arbitrary, unreasonable, and unjust classification or selection?

Reasons For Granting Certiorari

1. The Circuit Court of Appeals has decided a gravely important question of federal law which has not been, but should be, settled by this Court.

The opinion of the Circuit Court is predicated upon the startling and shocking premise that "We cannot say that it would not be within the power of a state to require all inhabitants to have their fingerprints taken by the police". We believe this seemingly superficially considered pronouncement concerning the constitutional rights and freedoms of individuals to be a wholly novel one, which, if not sound and if permitted to stand, would have its reverberations with devastating consequences to human dignities in every municipality and state of this land. The magnitude of the public importance of the projection of such a con-

cept under the authorship of a United States Circuit Court of Appeals suggests that this Court should pass upon its authenticity in its incipiency.

2. The Circuit Court has decided an important federal question in a way probably in conflict with applicable decisions of this Court.

The Circuit Court completely ignored and failed to give efficacy to the legal concept long recognized by this Court that police power must be so exercised as not to invade unreasonably the rights guaranteed by the Federal Constitution. In so doing the Court likewise failed to recognize and apply the legal standards by which this Court in the evolutionary process of inclusion and exclusion has measured the reasonableness and unreasonableness of the exercise of such power. The Circuit Court decision, therefore, failed to follow and is inconsistent with the long line of decisions in which this Court has recognized and applied these principles.

Prayer

WHEREFORE, your petitioners pray that a Writ of Certiorari be issued under the seal of this Court directed to the United States Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court the transcript of the record in the above entitled cause, the same being Number 13066 in that Court, and that the record and judgment of said Court be considered to the end that said cause may be reviewed and determined and that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed and the cause remanded for further proceedings according to law.

JOHN A. DARSEY,
JOHN M. SLATON,
Attorneys for Petitioners.

JOHN A. DARSEY,
Hurt Building,
Atlanta, Georgia;
JOHN M. SLATON,
22 Marietta Street Building,
Atlanta, Georgia;
JOHN W. NESBITT,
Hurt Building,
Atlanta, Georgia,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit (R. 30-32) was filed April 21, 1950. The opinion is reported in the advance sheets at 181 F. (2d) 693. The opinion of the District Court (R. 22-30) is reported in 89 F. Supp. 309.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, Section 1254 (1), of the United States Code.

Specification of Errors

The Circuit Court of Appeals for the Fifth Circuit erred:

1. In failing to recognize and apply the legal limitations upon the exercise of police power and the well established legal yardsticks and standards commonly employed by the Judiciary in determining whether exercise thereof is reasonable or unreasonable;

2. In failing to reverse the decree of the District Court dismissing the petition and to hold that the ordinance comprises an unreasonable exercise of the police power and therefore invalid because:

(a) The means employed impose unreasonable and undue restrictions and burdens upon rights secured to the petitioners by the Bill of Rights;

(b) The means adopted are not reasonably necessary and appropriate for the accomplishment of the purported objective;

(c) There is not an obvious and real connection between the means adopted and the avowed objective;

(d) The means adopted do not tend toward the accomplishment of the purported objective in a decree that is perceptible and clear;

(e) The means go far beyond the necessities of the case;

(f) The means adopted vest power of arbitrary discretion with reference to constitutional personal rights and freedoms in an administrative officer without prescribing uniform and definite standards for the exercise thereof; and

(g) The means employed embrace an arbitrary, unreasonable and unjust classification and selection.

Statement of the Case

Recently the City of Atlanta amended the ordinance relating to permits for trolley drivers with what has become known as the "Fingerprint Law." The ordinance, as amended, provides, *inter alia*, that no person may drive trackless trolleys, etc., used in the transportation of persons for hire upon the city streets without a permit; sets forth certain conditions precedent to the granting of such permits, the controversial ones of which are the submission to fingerprinting and the furnishing and publication of personal photographs; and vests in the Chief of Police the authority to deprive the drivers of the fruits of their lawful avocation through delegation to him of undefined and unlimited authority to exercise discretion in suspending and revoking such permits. The ordinance, enacted in the name of public safety, applies only to the drivers of an infinitesimal portion of the commercial and public traffic on the city streets; provides for a $100.00 fine for the violation of any provision thereof, with each day's violation a separate offense, thus imposing an undue financial burden

upon the individual driver in any court test of his constitutional rights. (R. 13-20)

Thereupon, petitioners, who are officers and members of the local transit union, the membership of which comprises some seventeen hundred odd trolley drivers, brought a petition in the District Court challenging the ordinance, as amended, as unconstitutional in that it represents a ruthless and flagrant invasion of their constitutional personal rights and freedoms for no reason germane to the purported objective and, therefore, an unreasonable and arbitrary exercise of police power. (R. 1-11)

The District Court dismissed the petition. In affirming the judgment of the District Court, the Circuit Court of Appeals predicated its decision upon the shocking and startling concept that "We cannot say that it would not be within the Power of a state to require all inhabitants to have their fingerprints taken by the police". Petitioners then filed in this Court their petition for a writ of certiorari to the said Circuit Court of Appeals.

Argument

At the outset we should like to make clear that the exercise of police power as embodied in the ordinance, as amended, may not be justified upon the premise that it only comprises conditions upon which the City has granted the privilege of the use of its streets for the conduct of a business for revenue purposes. In 1902 the City granted to the Georgia Power Company a franchise to operate trolleys and motor driven vehicles for hire on the city streets. This franchise did not place any restrictions upon, or in any wise purport to establish any standards, terms or conditions with which the Company should comply in the employment of its operating personnel, nor did it make any reservations in this respect. (Ord. Bk. vol. 5, p. 639) With only those

changes and transitions normally incident to evolution and progress the seventeen hundred odd members of the present local transit union, of which the petitioners are officials and members, and their predecessors, have for almost five decades operated the trolleys and busses of the company on terms and standards of employment determined and established by the company and the employees.

Thus, it is clear that insofar as the privilege to use the streets for revenue purposes in this instance is concerned that privilege is granted to the Power Company and any right or authority to condition it would find its foundation in the relationship between the Power Company and the City. We think it is equally as clear that the right of the petitioners to contract with the Power Company to drive the busses for a stipulated wage is a lawful avocation which they have a constitutional right to pursue without the granting of any privilege from the City, conditional or otherwise. Therefore, the authority of the City to regulate such avocation, as is here attempted, must rest upon the inherent police power of the City rather than upon the City's prerogative to place such conditions as it might choose upon the granting of a privilege to use its streets for revenue purposes. And, it follows that the exercise of such power is subject to the long recognized legal limitation that the means employed must not impose unreasonable restrictions and burdens upon rights secured to individuals by the Bill of Rights. (*Louis K. Liggett Company* v. *Baldridge,* 278 U. S. 105, 111-12)

We are familiar with the authorities which have dealt with the exercise of state police power to require fingerprinting and photographing for identification purposes in connection with arrest, indictment and conviction, and in connection with businesses such as saloons and gambling

houses which might adversely affect the public morals,[1] but so far as we are able to ascertain the requirements here involved as to fingerprinting and photographing as conditions precedent to a permit to engage in a lawful avocation which by nature does not lend itself to the corruption of public morals presents a novel, and to say the least, radical exercise of such power.

We believe that the palpable and grave invasion of personal and private rights as is here undertaken may not be more effectively silhouetted than was done by the Court in *Gow* v. *Bingham,* a case in which the Police Department of the City of New York had subjected Gow, who had been indicted for grand larceny and forgery, to photographing and body imprints under color of authority of police regulations. In passing upon the lawfulness of the conduct of the Police Department in this respect the Court said:

"There are certain rights pertaining to mankind which have their origin independent of any express provision of law, and which are termed 'natural rights'. One of these is the right of personal liberty. This includes not only absolute freedom to everyone to go where and when he pleases, but the right to preserve his person inviolate . . . no statute . . . authorizes any member of the police force of this city to deprive any person of his liberty of action, or invade his right of personal immunity to the extent of requiring him to submit to having his photograph taken, and measurements and impressions of his body made . . . simply because such person has been indicted . . . the time has not yet come when the entire sovereign power of the people of the state, executive, legislative, and judicial is

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[1] *State ex rel. Bruns* v. *Clausmeier,* 154 Ind. 599, 57 N. E. 541; *McGovern* v. *VanRiper,* 137 N. J. Eq. 24, 43 A. 2d 514; *State ex rel. Marity* v. *Tyndall,* 224 Ind. 364, 66 N. E. 2d 755, app. dism'd, 333 U. S. 834, reh'g denied, 333 U. S. 858; *Norman* v. *City of Las Vegas,* 64 Nev. 38, 177 P. 2d 442.

united in a member of the police force. The acts (photographing and taking body imprints) of the police department here criticized were not only a gross outrage, not only perfectly lawless, *but they were criminal in character.* Every person concerned therein is not only liable to a civil action for damages, *but to criminal prosecution for assault.*" *Gow* v. *Bingham,* 107 N. Y. S. 1011, 1014, 1015, 1018. (Emphasis supplied.)

This Court in the case of *Schneider* v. *State,* 308 U. S. 147, 164 had occasion to and did condemn the photographing and fingerprinting provisions of an ordinance as unduly burdensome.

The city has no power, under the guise of police regulations, arbitrarily to invade the personal rights and liberties of the individual citizen, to interfere with private business or impose unusual or unnecessary restrictions upon lawful occupations, or to invade property rights. For as stated by the Court in *Meyer* v. *Nebraska,* 262 U. S. 390, 399, "Without doubt, it (the 14th Amendment) denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. (*Slaughter-House Cases,* 16 Wall. 36, 21 L. ed. 394. Citing many other authorities.) The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not

final or conclusive, but is subject to supervision by the courts. *Lawton* v. *Steele,* 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499."

There was thus squarely presented to the Circuit Court of Appeals the question of the reasonableness or unreasonableness of this flagrant invasion of the personal rights and freedoms of the petitioners. The Circuit Court completely ignored or glossed over this long established limitation upon police power and blandly disposed of this fundamental issue with the specious and patently unsound premise that "We cannot say that it would not be within the power of a state to require all inhabitants to have their fingerprints taken by the police". In so doing, the Circuit Court ignored and failed to apply the standards definitely established by this Court through the years in the process of inclusion and exclusion in determining the reasonableness or unreasonableness of the exercise of such power.

It is understandable that a Circuit Court of Appeals, burdened with an unusual volume of judicial responsibilities, in passing upon an issue involving an invasion of constitutional rights, might not consider such invasion to be as grave and as serious as those adversely affected thereby. But it is difficult to comprehend such an unusual departure from our constitutional system of checks and balances by a Circuit Court of Appeals as would countenance the concept that the state without any limitation or judicial review or restraint may require all of its inhabitants to submit to fingerprinting and photographing.

The very magnitude and unimaginable reverberations of such a pronouncement alone would strongly suggest the wisdom of review by this Court entirely aside from the obvious incongruity between its portent and the precedents of this tribunal. (*Lawton* v. *Steele,* 152 U. S. 133; *California Reduction Company* v. *Sanitary Reduction Works of San*

Francisco, 199 U. S. 306; *House* v. *Mayes,* 219 U. S. 270; *Adams* v. *Tanner,* 244 U. S. 590; *Meyer* v. *Nebraska,* 262 U. S. 390; *Burns Baking Company* v. *Bryan,* 264 U. S. 504; *Liggett Company* v. *Baldridge,* 278 U. S. 105).

The ordinance is void, and the Circuit Court erred in not so holding, because the means adopted are not reasonably necessary and appropriate for the accomplishment of the purported objective, there is no obvious and real connection between the means adopted and the avowed objective, the means adopted do not tend toward the accomplishment of the purported objective in a degree that is perceptible and clear, and the means go beyond the necessities of the case.

The mere assertion by public authority that an enactment relates to the public safety does not itself bring that enactment within the police power. There must always be an obvious and real connection between the actual provisions and its avowed purpose. (*California Reduction Co.* v. *Sanitary Reduction Works,* 199 U. S. 306.)

The Circuit Court did not have before it any semblance of a basis, other than the City's imperious assertion that it is a safety ordinance, upon which it could predicate a conclusion that the fingerprint and photograph requirements thereof bear any relationship to public safety. And, we submit with confidence that the City upon inquiry by the Court would be at a complete loss to supply any basis for any such conclusion.

We realize that fingerprints and photographs have been recognized as appropriate means of identification. However, what more identification does the public safety of the City of Atlanta require, than that accomplished by the registration and licensing of the drivers by the State Department of Safety? The obvious answer mirrors the sheer sophistry of the projected inference. Suppose it

should be suggested that the City Police Department needs fingerprints and photographs to determine if some of the drivers have been convicted of crime relating to public safety. The conclusive answer is found in Ga. Code, Secs. 92A—430 and 92A—434, which make provisions for the reporting of convictions of such crimes to that office, and the revocation of licenses on the basis thereof, and in the legal concepts that the means adopted must tend toward the accomplishment of the alleged objective in a degree that is perceptible and clear, and the means should not go beyond the necessities of the case. (*House* v. *Mayes,* 219 U. S. 270, 282.)

Measured by these standards the ordinance must be condemned for it could not accomplish any "perceptible and clear" result over and beyond that already accomplished by State enactment, and it therefore goes "beyond the necessity of the case" and falls in the category of an ordinance which has no real, substantial or rational relation to the public safety, and therefore a palpable invasion of rights secured by the fundamental law which cannot be sustained as a legislative exercise of the police power. (*Lawton* v. *Steele,* 152 U. S. 133; *Jay Burns Baking Co.* v. *Bryan,* 264 U. S. 504; *Adams* v. *Tanner,* 244 U. S. 590.)

Also, the ordinance is void, and the Circuit Court erred in not so holding because it vests power of arbitrary discretion with reference to constitutional personal rights and freedoms in an administrative officer without prescribing uniform and definite standards for the exercise thereof.

It is well established that any municipal ordinance which vests an arbitrary discretion in public administrative officials with reference to the rights, property, or business of individuals without prescribing a uniform rule of action, making the enjoyment of such rights dependent upon the arbitrary choice of the officers and without furnishing any

definite standard for the control of such officers is unconstitutional, void and beyond the powers of a municipality. (*Hague* v. *Committee for Industrial Organization,* 307 U. S. 496; *Barbier* v. *Connally,* 113 U. S. 27; *Heardt* v. *City of Portland,* 8 F. (2d) 871.)

The ordinance here provides in part as follows:

"The Chief of Police may in his discretion revoke or suspend for a definite or an indefinite period any permit granted under the provisions of this ordinance or any other ordinance relating to the same subject matter whenever it shall be made to appear that the holder of such permit has violated any provision of this ordinance . . ."

Other of its provisions are:

"All operators of vehicles coming within the purview of this ordinance, as amended, shall obey the following rules and regulations: . . . They shall dress neatly and be clean of body and wearing apparel . . . shall at all times operate their vehicles carefully and courteously . . ."

The manifest import of the above quoted portion of the ordinance is to vest in the Chief of Police broad and sole discretion in defining such vague and unscientific terms as neatness, cleanliness, carefulness and courteousness. The determination by the Chief of Police that an operator is not neat, or clean about his person, or is not careful or courteous in the operation of his vehicle, affords a basis for the suspension or revocation of his permit. The same ordinance further provides that the driver whose permit has been so revoked or suspended may appeal the action of the Chief of Police to the Police Committee, which shall review the action of the Chief of Police, and may take such action as it deems proper, "either affirming, revoking or modifying the order of the Chief of Police." No more

definite standards are provided by the ordinance for this administrative review than are set out for the guidance of the Chief of Police in his determination.

Moreover, pending such a review and assuming it to be adequate in law, any drivers who may have had their permits revoked by the Chief of Police would be fired as a consequence thereof, thereby suffering serious injury to their contract, seniority, and pension rights, aside from the invasion of their personal rights, and thus be deprived of the many years fruits of their collective bargaining rights which are guaranteed to them by the *National Labor Relations Act*, 49 Stat. 449.

The indefiniteness of the basis afforded the Chief of Police for suspension or revocation of licenses is tantamount to no standards at all, and allows this administrative officer to employ unbridled discretion and his own personal standards of fitness for permit holders. He is allowed by the ordinance to legislate where the municipal government has failed to legislate.

Petitioners are thus deprived of the rights guaranteed them under the 14th Amendment of the United States Constitution, i. e., due process of law and equal protection of the law.

Administrative officials should only exercise ministerial functions. The duties of administrative officials in enforcing and administering police regulations must be clear and definite. The municipality may not delegate to its officers the power to determine what is necessary for the safety and welfare of the community.

Thus it is clear that the powers granted to the Chief of Police in the portion of the ordinance set out above jeopardize the substantial personal and property rights of petitioners in that their permits may be summarily taken

from them and they may be thus deprived of their livelihood and their right to work.

Perhaps the leading case upon the topic of wrongful delegation of authority by a municipality to an administrative officer or board is that of *Yick Wo* v. *Hopkins, Sheriff,* 118 U. S. 356, which dealt with a San Francisco ordinance that made it unlawful to maintain a laundry within the city limits without first obtaining written permission of the board of supervisors, except where the laundry was located in a building of either brick or stone. The ordinance upon its face and upon the record of its administration revealed an invidious discrimination among those within prescribed limits. The Court said:

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power . . . *The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself* . . ." (Emphasis supplied).

For these reasons we submit that the ordinance must be held to comprise an unconstitutional delegation of legis-

lative authority to an administrative officer and that the Circuit Court erred in not so holding.

Again, the ordinance is void, and the Circuit Court erred in not so holding, because it embraces an arbitrary, unreasonable and unjust classification and selection.

The classification made by a municipality in the exercise of its police powers must not be arbitrary, unreasonable, and unjust. Such classification must have some reasonable basis considering the end in view and the object of the regulation, and "arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this." (*Gulf, Colorado & Santa Fe Railway Co.* v. *W. H. Ellis,* 165 U. S. 150, 159.)

If the ordinance in question here could be said to have any justifiable objective it would be the promotion of the safety of all persons coming upon the city streets either in vehicular conveyances or as pedestrians. This large class of persons includes all those drivers and passengers of private automobiles traveling upon the streets, going to and from work, shopping, for purposes of pleasure and sundry other reasons, countless commercial service and delivery vehicles, freight vans, trucks hauling building supplies, and automobiles engaged in the innumerable other component uses to which the public streets are put in the complex functions of city life. The trolleys of the Power Company which are driven by petitioners and the members of their union constitute only an infinitesimal fraction of all those so using the streets and comprising the aggregate metropolitan traffic.

The instant ordinance, under the guise of promoting the public safety, sets up qualifications for the procurement and retention of permits by operators of motor propelled vehicles used in the transportation of passengers

for hire over the city streets. The applicability of the ordinance does not extend to the great mass of operators of vehicles so comprising the traffic upon the city streets. There being no basis for singling out the particular persons against whom the ordinance here operates to impair their constitutionally guaranteed rights, no facts or circumstances from which might arise apprehensions for the public safety by virtue of the pursuit of their means of livelihood, no peculiar characteristics as drivers of motor propelled vehicles which might render them, under the police power, more susceptible objects of surveillance and investigation as prerequisite and concomitant to their engaging in such activity, the delimitation of the class to which the ordinance is applicable may only be viewed as an arbitrary discrimination against these persons, denying them the equal protection of the law.

In *Gulf, Colorado & Santa Fe Railway Co.* v. *W. H. Ellis, supra,* a case which was decided upon the point of reasonable classification in legislation, the Court said:

"But it is said that it is not within the scope of the 14th Amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true . . . , yet it is equally true that such classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the attorneys' fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just rela-

tion to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis . . . .

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

In *Cotting* v. *Godard,* 183 U. S. 79, a statute limited the amount stock yards of a certain size might charge, while not limiting the charges to be made by similar businesses doing a smaller amount of business. In holding that the statute unreasonably and arbitrarily discriminated in classification, the Court said:

"This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quality of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

There can be no greater danger of unqualified drivers among petitioners constituting a menace to public safety than there is danger of unqualified drivers among the vast balance of persons driving vehicles in the city traffic constituting such a hazard. Indeed, with the thorough screening and training of applicants to operate trolleys employed

by the public transit system of the city, its strict supervision of its operators for so long as they are employed by the Company, the strict requirements to the obtaining of a state chauffer's license, and in view of the excellent safety record of these operators over a period of many years, no necessity whatsoever presents itself for further municipal policing of the qualifications of these particular persons to drive motor vehicles.

Thus, it is obvious that the mere fact that the petitioners drive for a wage the equipment of a public utility, places them in no different relation to public safety than the drivers of other buses, trucks, moving vans, and motor vehicles.

We, therefore, submit that the classification here made is wholly arbitrary and capricious and violates the equal protection clause of the Constitution and the Circuit Court erred in not so holding.

Conclusion

On the basis of the foregoing considerations we respectfully urge that the petition for writ of certiorari be granted.

Respectfully submitted,

JOHN A. DARSEY,
JOHN M. SLATON,
Attorneys for Petitioners.

JOHN A. DARSEY,
Hurt Building,
Atlanta, Georgia;

JOHN M. SLATON,
22 Marietta Street Building,
Atlanta, Georgia;

JOHN W. NESBITT,
Hurt Building,
Atlanta, Georgia,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1950

NO. 179

J. L. WALTON, J. S. PICKARD, A. E. TOWNSEND AND S. C. GURLEY, PETITIONERS,

vs

CITY OF ATLANTA, ET AL, RESPONDENTS

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

FILED

J. C. MURPHY
Attorney for Respondents
803 C & S Natl. Bank Bldg.
Atlanta, 3, Georgia

J. C. SAVAGE
J. M. B. BLOODWORTH
JOHN E. FEAGIN
HENRY L. BOWDEN
803 C & S Natl. Bank Bldg.
Atlanta, 3, Georgia
Of Counsel

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SUPREME COURT OF THE UNITED STATES

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NO. 179

J. L. WALTON, J. S. PICKARD, A. E. TOWNSEND and S. G. GURLEY,

Petitioners

VS

CITY OF ATLANTA, ET AL,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JURISDICTION

Jurisdiction does not affirmatively appear upon the Record. The petition (R. 1- 11) fails to show diversity of citizenship or that the amount in controversy exceeds Three Thousand ($3,000.00) Dollars. The petition alleges in general terms that ordinances of the City of Atlanta attached to the petition as exhibits contravene alleged constitutional rights. The allegations in this particular are not substantial. It is uniformly held by this Court that jurisdiction must be denied in all cases coming before it where such jurisdiction does not affirmatively appear in the record on which it is called to act. *Mansfield etc. R. Co. v. Swan,*

111 U. S. 379; King Iron Bridge Co. v. Otoe County, 120 U. S. 225.

The existence of a substantial Federal question must be determined by the allegations of the bill of complaint. *City Ry. Co. v. Citizens' St. R. Co., 166 U. S. 557; Blumenstock Bros. Advertising Agency v. Curtis Publishing Co., 52 U. S. 436.*

STATEMENT OF THE CASE

The petition (R. 1 - 11) challenges the validity of the ordinance of the City of Atlanta, Georgia, approved September 8, 1949 (R. 16 - 20) together with amendments to the ordinance (R. 12 - 16). Section 1 of the ordinance (R. 16) declares that it is supplementary to all existing ordinances relating to the issuance, suspension and revocation of permits to drivers of motor propelled vehicles used in the transportation of passengers for hire over the streets of the City of Atlanta. Section 7 of that ordinance (R. 18) prohibits the issuance of permits to any applicant who has been convicted of named offenses. It is not alleged that any application for a permit has been refused by the defendant or that any existing permit has been revoked. The defendant filed a motion to dismiss upon the following grounds: that the complaint sets forth no cause of action; that the complaint is prematurely brought in; that it is based on mere apprehension of injury; that the plaintiffs have no constitutional or legal rights to operate a vehicle for hire; that no constitutional questions are involved; that it is not shown that the plaintiffs have suffered or will suffer any irreparable damage; that the complaint seeks injunctive relief against the enforcement of a penal ordinance; that the plaintiffs have a full, complete and adequate remedy at law; and that the question has been adjudicated. Upon hearing the District Court entered an order granting the motion to dis-

miss and dismissing the petition (R. 30). The Court below affirmed that decision (R. 32).

REASONS FOR GRANTING THE CERTIORARI

It is thought that no substantial reason exists for granting the Court's writ of certiorari in this case. None of the cases cited by counsel for the petitioners show any of the grounds for granting a certiorari set forth in sub-paragraph 5 of rule 38 of this Court. No Circuit Court of Appeals' decision in point has been cited in conflict with the decision which the petition seeks to review. The question raised by the petition has heretofore been determined against the contentions of the petitioners by this Court. One of the leading cases is *Packard v. Benton, 264 U. S. 140.*

It is well recognized and established by the decisions of this Court, which have been generally followed by all the other courts, both State and Federal, that the use of the streets for ordinary purposes may be controlled and regulated by public authority in the exercise of its police power whenever and to the extent necessary to provide for the safety, peace, health, morals and general welfare of the people. *Clark v. Poor, 274 U. S. 554; Morris v. Duby, 274 U. S. 135; 25 Amer. Jur., Highways, Paragraph 253.* Transportation of passengers for hire does not fall within the ordinary way in which streets are used. Their use for gain is special and may be wholly prohibited or conditioned as the municipal authorities may deem proper. *Packard v. Benton, 264 U. S. 140.* This distinction is the foundation of all franchises.

The leading Georgia case is *Schlesinger v. City of Atlanta, 161 Ga. 148,* which holds that individuals do not have the inherent right to conduct their private business in the streets of the city.

THE CHALLENGED ORDINANCE IS A REASONABLE EXERCISE OF THE POLICE POWER

The ordinance (R. 16 - 20) on its face is supplementary to existing ordinances and relates to the drivers of all motor propelled vehicles used in the transportation of passengers for hire over the streets of the City of Atlanta. It sets up a system for the procurement of permits. Section 7 (R. 18) prohibits the issuance of permits to persons who may have been convicted of manslaughter; driving a motor vehicle under the influence of liquor; any felony in which a motor vehicle is used; failure to stop and render aid; perjury or false swearing; conviction or forfeiture of bail not vacated upon three charges of violating motor vehicle laws of Georgia within a twelve month period; violation of any law involving moral turpitude and repeated violations of City ordinances which affect the safety of human life or limb upon the streets of the City. It will be noted from the amendment to the ordinance (R. 16) that the Chief's action in revoking a permit must be approved by the Mayor and General Council before it becomes effective. It does not appear that any person has been refused a permit nor does it appear that any permit has been revoked.

It is respectfully submitted that the petition for the writ of certiorari be denied.

Respectfully submitted,

J. C. MURPHY
Attorney for Respondents